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No. 95-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

WILFRED WAYLON JACKSON,

Petitioner,

v.

CITY OF ATLANTA, TEXAS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, the exclusive remedy for claims of employment discrimination on the basis of race for state or local government employees, so that such employees may no longer bring an action under 42 U.S.C. § 1983 for claims of racial discrimination in employment, a question concerning which there is a conflict among the courts of appeals?

PARTIES

The parties in the proceedings below were:

Winfred Waylon Jackson,

Plaintiff in the District Court, Plaintiff-Appellee in the Court of Appeals.

City of Atlanta, Texas,

Defendant in the District Court.

Jim Long, Peyton Childs, Charles Riley, John Pierce Ellis, and Randall Lee,

Defendants in the District Court, Defendants-Appellants in the Court of Appeals.

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No. 95-

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WINFRED WAYLON JACKSON,

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V.

CITY OF ATLANTA, TEXAS, *et al,*

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Winfred Waylon Jackson, respectfully prays that a writ of certiorari issue to review the opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on January 24, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 73 F.3d 60 (5th Cir. 1996), and is set out at pages 1a-8a of the Appendix hereto ("App."). The order of the Court of Appeals denying a timely petition for rehearing is unreported and is set out at App. at 12a-13a. The Order of the District Court for the United States District Court for the Eastern District of Texas is unreported and is set out App. at 9a-11a.

JURISDICTION

The decision of the Fifth Circuit was entered on January 24, 1996. A timely petition for rehearing was filed and was denied on March 6, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves:

Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e, which provides, in pertinent part:

> (a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers. (As amended by P.L. 92-261, eff. March 24, 1972.)
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such

> person, but such term does not include (1) the United States, and Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service . . . . (As amended by P.L. 92-261, eff. March 24, 1972.)
>
> * * *
>
> (i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991, which provides, in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens . . . .
>
> (b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relations.
>
> (c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law. (As amended, P.L. 102-166, eff. November 21, 1991.)

42 U.S.C. § 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

A. The Proceedings Below.

This action was filed on December 17, 1993, in the United States District Court for the Eastern District of Texas, Marshall Division. Plaintiff, an African American citizen of the United States, alleged that he had been discriminated against in employment on because of his race and, therefore, stated claims and causes of action under 42 U.S.C. § 2000e, *et seq.*, Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972; 42 U.S.C. § 1981, as amended by the Civil Rights Act of 1991; and 42 U.S.C. § 1983. Plaintiff also set out claims for defamation and for intentional infliction of emotional distress under state law. The defendants are the City of Atlanta, Texas, and city officials, including the City Manager, Mayor, and members of the City Council of the City of Atlanta, all of whom were sued in both their official and individual capacities.

After answers, an amended complaint, and amended answers were filed, both the City and the individual defendants moved to dismiss or alternatively for summary judgment on a number of grounds. These included claims of absolute and qualified immunity.

The district court granted the motions of all defendants to dismiss the claims under state law. The court, on the other hand, denied the motions to dismiss on the basis of qualified or absolute immunity and denied the motions for summary judgment. App. 9a-11a.

The individual defendants (but not the City of Atlanta), filed an appeal from the denials of their motions to dismiss and for summary judgment. The Court of Appeals held that it was without jurisdiction over the denial of summary judgment with regard to plaintiff's claims under Title VII, and remanded that issue to the district court for trial.

With regard to the issue of qualified immunity, the Court of Appeals held that it had jurisdiction over that issue under the decision of this Court in *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), since the issue presented was solely a matter of law. App. 4a-5a. The issue of law involved was whether the district court had jurisdiction over plaintiff's claims under 42 U.S.C. § 1983, or whether his exclusive remedy was under Title VII of the Civil Rights Act of 1964.

The Fifth Circuit held that when Title VII was amended by the Equal Employment Opportunity Act of 1972 to include state and local government agencies, it became the exclusive remedy for claims of discrimination in employment against such agencies. Therefore, the district court lacked jurisdiction over plaintiff's claims under section 1983 and those claims were ordered dismissed. Although the complaint stated a claim under 42 U.S.C. § 1981 (as amended by the Civil Rights Act of 1991) and § 1983 together, the Fifth Circuit did not mention section 1981 in its opinion.

The defendants-appellants filed a timely petition for rehearing on the ground, *inter alia*, that they, in their individual capacities, should have been dismissed as defendants to the Title VII action. *See*, *Harvey v. Blake*, 913 F.2d 226 (5th Cir. 1990). The Court of Appeals denied the petition for rehearing on March 6, 1996. App. 12a-13a.

B. Statement of the Facts

According to the allegations of the complaint filed in this action, which allegations are to be assumed true in the current posture of the case, petitioner was employed by respondent City of Atlanta, Texas, as the Fire Chief from April, 1989, until his termination on December 18, 1992.[1] He was terminated by respondent Jim Long, who was at that time the City Manager of the City of Atlanta. Mr. Long informed the petitioner that he was being discharged for alleged animosity, alleged low morale, and alleged disharmony within the Fire Department.

The petitioner challenged Mr. Long's action on the ground that the real reason for the termination was petitioner's race. The complaint alleged that Long had consistently undermined his authority as Fire Chief and had tried to force him out of his position because of his race. Petitioner was the only African-American supervisor in the fire department, was the only African-American department head, and was the highest ranking African-American employee of the city. Petitioner further charged that Mr. Long did not follow the discharge policies of the city and that similarly situated white individuals who were terminated before and after petitioner were not treated in the same manner as was petitioner.

After petitioner was terminated, he appealed the termination to the City of Atlanta City Council, and attempted to bring to the attention of the City Council the alleged illegal motives and actions of Mr. Long. The other respondents in this action, Charles Riley, John Pierce Ellis, Randall Lee, and Peyton Childs (all of whom are Caucasian), are members of the City Council and the Mayor of the City of Atlanta. They voted to uphold the

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[1]Since petitioner was terminated after the effective date of the Civil Rights Act of 1991, he stated a claim under 42 U.S.C. § 1981(b).

termination of petitioner. Petitioner further alleged that the respondents defamed the character of the petitioner in a variety of ways in order to ruin his reputation and to further harm him.

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO THE IMPORTANT QUESTION OF WHETHER TITLE VII IS THE EXCLUSIVE REMEDY FOR CLAIMS OF DISCRIMINATION IN EMPLOYMENT BROUGHT BY STATE AND LOCAL GOVERNMENT EMPLOYEES.

A. The Conflict Among the Circuits

The Court of Appeals for the Fifth Circuit held in the present case that:

> The governing statute, Title VII in this case, provides Jackson's exclusive remedy. Congress intended for Title VII—with its own substantive requirements, procedural rules, and remedies—to be the exclusive means by which an employee may pursue a discrimination claim. Allowing a plaintiff to state a discrimination claim under § 1983 as well would enable him to sidestep the detailed and specific provisions of Title VII.

App. 6a. Since petitioner's allegations of racial discrimination establish a violation of Title VII, "§ 1983 is not available to Jackson for either alternative or additional relief." App. 7a. Therefore, "Jackson's putative § 1983 claims . . . should have been dismissed." *Id.*

In its opinion, the Fifth Circuit relied on an earlier decision, *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984), and distinguished another earlier decision, *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). App. 6a, n. 13. In

Johnston, the court below explained, the employer's alleged conduct violated "both Title VII and a *separate constitutional or statutory right*." *Id.* (emphasis in the original). In the present case, on the other hand, the sole basis for the § 1983 claim was racial discrimination; therefore, *Johnston* was inapplicable.

The Fifth Circuit has, therefore, placed itself in square conflict with at least six other circuits. Thus, in *Annis v. County of Westchester*, 36 F.3d 251 (2nd Cir. 1994), the Second Circuit held that a public employee can bring an action for discrimination based on sex pursuant to § 1983, concluding "that Title VII is not intended to be an exclusive remedy for sex discrimination in the workplace." 36 F.3d at 253. Thus, the Second Circuit reversed the district court's dismissal of the § 1983 action, which dismissal was based on the same reason relied on by the Fifth Circuit here, *i.e.*, that the employee must be required to follow all of the procedural steps required by Title VII.

In the course of its decision, the Second Circuit cited decisions in the Third,[2] Fourth,[3] Sixth,[4] Seventh,[5] Ninth,[6]

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[2]*Bradley v. Pittsburgh Board of Educ.*, 913 F.2d 1064 (3rd Cir. 1990).

[3]*Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987).

[4]*Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984). However, a recent unpublished decision of the Sixth Circuit held that Title VII is the exclusive remedy for employment discrimination claims, and that such an action cannot be brought under § 1983. *Willis v. Morris*, 70 F.3d 116, 1995 WL 613642 (6th Cir. No. 95-5107, Oct. 18, 1995) *cert. denied*, 64 U.S.L. W. 3639 (March 25, 1996).

[5]*Trigg v. Fort Wayne Community Schools*, 766 F.2d 299 (7th Cir. 1985).

[6]*Roberts v. College of the Desert*, 870 F.2d 1411 (9th Cir. 1988).

and Tenth Circuits[7] as holding that Title VII is not the exclusive remedy for discrimination claims against state or municipal employers, where those claims derive from violations of Constitutional rights.[8] It particularly noted the decision of the Fourth Circuit in *Keller v. Prince George's County*, 827 F.2d 952, 958-62, 965-66 (4th Cir. 1987), for its exhaustive discussion of the legislative history of the Equal Employment Opportunity Act of 1972.

B. The Importance of the Issue.

Whether Title VII repealed by implication the provisions of 42 U.S.C. § 1983, and perhaps § 1981 as well, insofar as they applied to employment discrimination claims, is clearly a question of great importance since it impacts on the availability of the full range of remedies for discrimination that violates the rights of state and local government employees.[9] As the Fifth Circuit itself noted, § 1983 authorizes compensatory and punitive damages to an extent not provided for by Title VII, even as amended by the Civil Rights Act of 1991, since that statute sets limits on the total amount of such damages.[10] App. 6a, n. 17.

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[7]*Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989). *But see Allen v. Denver Public School Board*, 928 F.2d 978, 981-82 (10th Cir. 1991).

[8]The Second Circuit also cited the Fifth Circuit as consistent with its position because of the decision in *Johnston v. Harris County Flood Control District*, discussed above.

[9]Although the Fifth Circuit does not discuss petitioner's claims under 42 U.S.C. § 1981, the reasoning behind its decision would seem to require the conclusion that Title VII also eliminated any cause of action under that provision as well, at least for state and local government employees. *Cf. Jett v. Dallas Ind. School District*, 491 U.S. 701 (1989).

[10]42 U.S.C. 1981a(b)(3) limits the recovery of compensatory and punitive damages combined to a maximum of $300,000 for an employer with 500 or more employees, with lesser maximums for

Further, section 1983 permits suits against persons in their individual capacities who are alleged to be responsible for discriminatory employment actions. The Fifth Circuit has held that Title VII, on the other hand, by its language and intent provides a cause of action only against the entity that employs the claimant.[11] Thus, the result of the decision below will be to limit severely the remedies available to victims of employment discrimination through the unfavored device of a repeal by implication.

A further effect of the decision will be to wipe out throughout the Fifth Circuit the discrimination claims of public employees who have relied on §§ 1981 and 1983 to present such claims in instances where they are unable to utilize Title VII.

C. The Decision Below is Erroneous.

As this Court has held, in a case that also involved the effect of the Equal Employment Act of 1972, sub silentio repeals of existing statutes are disfavored. Thus, *Morton v. Mancari*, 417 U.S. 535 (1974) held that the provisions of the 1972 Act that made Title VII applicable to federal government employees did not repeal by implication long-standing preferences to Native Americans in the Bureau of Indian Affairs.[12] The protections provided by 42 U.S.C. §

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smaller employers.

[11]*See Clanton v. Orleans Parish School Board*, 649 F.2d 1084 (5th Cir. 1084); *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994). *Accord*, *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1993); *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991).

[12]*Brown v. General Services Administration*, 425 U.S. 820 (1976), which held that Title VII was the exclusive remedy for federal government employees, is not to the contrary. There, this Court relied on Congress' intent to create a new judicial remedy where there had been none before because of the sovereign immunity of the United States. 425 U.S. at 828-29, 833-35. In contrast, 42 U.S.C. §

1983 are as long-standing, and there is a complete absence of any language in the amendments of Title VII that suggests an intent to eliminate its applicability to acts of employment discrimination.

Indeed, when the legislative history of the 1972 Act is examined, it is clear that the intent of Congress was precisely the contrary; both sections 1983 and 1981 were to remain available as alternative or complementary remedies for illegal discrimination. *See, Johnson v. Railway Express Agency*, 421 U.S. 454, 459 (1974); *Keller v. Prince George's County*, 827 F.2d at 958-62, 965-66. This was made explicit in the House Report on the Equal Employment Opportunity Act:

> In establishing the applicability of Title VII to State and local employees, the Committee wishes to emphasize that the individual's right to file a civil action in his own behalf, pursuant to the Civil Rights Act of 1870 and 1871, 42 U.S.C. §§ 1981 and 1983, is in no way affected. . . . Title VII was envisioned as an independent statutory authority meant to provide an aggrieved individual with an additional remedy to redress employment discrimination. . . . The bill, therefore, by extending jurisdiction to State and local government employees does not affect existing rights that such individuals have already been granted by previous legislation.

H.R. No. 92-238, pp. 18-19 (92nd Cong., 1st Sess. 1971). This language makes clear that it was Congress' intent to leave section 1983 intact and available for the redress of illegal employment discrimination.

1983 had long been available to state and local government employees to redress discrimination in employment.

Finally, the decision of the Fifth Circuit cannot be reconciled with this Court's decision in *Jett v. Dallas Ind. School District*, 491 U.S. 701 (1989):

> We hold that the express "action at law" provided by § 1983 for the "deprivation of any rights, privileges, or immunities secured by the Constitution and laws," provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor.

491 U.S. at 735. Here, petitioner's cause of action under § 1983 was specifically that the defendants, individually as well as in their official capacities, "have violated Plaintiff's right to contract on the basis of Plaintiff's race . . . in violation of 42 U.S.C. Section 1981 and Section 1983 . . . [and] Defendants were acting under color of authority of state law," and thus comes squarely within the holding of *Jett*. (Plaintiff's First Amended Original Petition, p. 13.) *Jett* in no way suggests that either § 1981 or § 1983 were superseded or repealed by implication when Title VII was enacted.[13]

In sum, the decision of the Fifth Circuit that Title VII is the exclusive remedy for employment discrimination claims is inconsistent with the legislative history of the Equal Employment Opportunity Act of 1972, with this Court's decisions in *Johnson v. Railway Express Agency, supra*, and *Jett v. Dallas Ind. School Dist., supra*, and with the decisions

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[13]In light of the legislative history of §§ 1981 and 1983 as discussed in *Jett*, this case involves none of the questions concerning the use of § 1983 to enforce substantive federal statutory rights that were raised in cases such as *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Middlesex County Sewage Authority v. Sea Clammers*, 453 U.S. 1 (1981); *Wright v. Roanoke Redevelopment & Housing Authority*, 479 U.S. 418 (1987); and *Suter v. Artist M.*, 503 U.S. 347 (1992).

of at least six other courts of appeals.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

WINFRED WAYLON JACKSON,
Plaintiff-Appellee,
v.
CITY OF ATLANTA, TX.,
et al., Defendants,

JIM LONG, Individually and in his
capacity as City Manager, et al.,
Defendants-Appellants.

No. 95-40266

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

Jan. 24, 1996.

Appeal from the United States District Court
for the Eastern District of Texas.

Before WEINER, PARKER and DENNIS,
Circuit Judges.

PER CURIAM:

Plaintiff-Appellee Winfred Waylon Jackson sued the city of Atlanta, Texas, as well as its city manager and several of its city council-men individually, asserting, *inter alia* claims of discrimination under both title VII[1] and 42 U.S.C. § 1983. Based on immunity, the city manager and city council (Defendants)—but not the City of Atlanta—filed motions to dismiss or, in the alternative, for summary judgment. Defendants appeal the district court's denial of these motions. We dismiss the appeal, in part, and reverse and remand, in part.

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[1]42 U.S.C. § 2000e.

I

FACTS AND PROCEEDINGS

In April 1989, Atlanta promoted Jackson, a black male, to the position of Fire Chief in the Atlanta Fire Department (Department). In December 1992, Jackson was terminated by Jim Long, the city manager. In explanation, Long cited animosity, low morale, and disharmony within the Department. Additionally, Long cited Jackson's refusal to allow a subordinate to use the Department's vehicle that is assigned to the Fire Chief. Jackson, the only black department head in Atlanta, thought that racial prejudice might have motivated his termination and requested a hearing before the Atlanta City Council (Council). After hearing his complaints in executive session, the Council announced that it had voted not to reinstate Jackson.

Jackson then filed the instant suit in federal district court, alleging, *inter alia*, causes of action for racial discrimination under both Title VII and § 1983.[2] Jackson does not dispute that these two federal claims arise out of identical fact situations and identical allegations of racial discrimination. On both claims, the defendants filed motions to dismiss for failure to state a claim or, in the alternative, for a summary judgment of dismissal. With respect to the § 1983 claim, these motions were based on qualified immunity. The district court denied all motions, stating that (1) Jackson had stated claims under both Title VII and § 1983, and (2) the existence of genuine issues of fact precluded summary judgment on both claims. The Defendants timely filed this interlocutory appeal.

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[2]Jackson also asserted supplemental state law claims for defamation and intentional infliction of emotional distress. As this is an interlocutory appeal of an immunity defense to a § 1983 claim, we have no jurisdiction over those issues at this early juncture in the litigation. *See Tamez v. City of San Marcos, Tx.*, 62 F.3d 123, 124 (5th Cir. 1995).

II

DISCUSSION

A. JURISDICTION

Before addressing the substantive issues in this appeal, we examine the basis for our jurisdiction.[3] On appeal, the Defendants challenge two aspects of the district court's order: First, they urge that the Title VII claims against them should have been dismissed, through either Rule 12(b)(6) or summary judgment. In like manner, they contend that the § 1983 claims against them should have been dismissed, through 12(b)(6) or summary judgment based on qualified immunity.

Generally, we do not have interlocutory jurisdiction over the denial of either a motion to dismiss or a motion for summary judgment, as such pretrial orders are not "final decisions" for the purpose of 28 U.S.C. § 1291.[4] Denials of motions to dismiss and motions for summary judgment in the Title VII context are non-final pretrial orders. Consequently, in this interlocutory appeal, we do not have jurisdiction to review the district court's order denying the Defendants' pretrial motions to dismiss or for summary judgment in Jackson's Title VII claims. We neither express nor imply an opinion on the merits of Jackson's title VII claims; we simply dismiss the Title VII facet of this appeal for lack of appellate jurisdiction and remand these claims for further proceedings.

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[3] *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987) ("This court must examine the basis of its jurisdiction, on its own motion, if necessary.")

[4] *See Sorey v. Kellett*, 849 F.2d 960, 961 (5th Cir. 1988)("Under 28 U.S.C. § 1291, the courts of appeals have jurisdiction over 'final decisions' of the district courts. Ordinarily, this section precludes review of a district court's pretrial orders until appeal from the final judgment.").

Jackson's § 1983 claims are another matter altogether. In *Mitchell v. Forsyth*,[5] the Supreme court held that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."[6] Recently, in *Johnson v. Jones*,[7] the Supreme Court made clear that our interlocutory jurisdiction under *Mitchell* begins and ends with the "purely legal" aspects of qualified immunity.[8] In *Johnson*, the supreme court reiterated the dichotomy in the grounds for denying a motion for summary judgment based on qualified immunity; "(a) a determination about pre-existing 'clearly established' law, or (b) a

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[5]472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

[6]*Id* at 530, 105 S.Ct. at 2817-18, *see also Hale v. Townley*, 45 F.3d 914, 918 (5th Cir. 1995)("An appellate court has jurisdiction to review an interlocutory denial of qualified immunity only to the extent that it 'turns on an issue of law.'" (quoting *Mitchell*, 472 U.S. at 530, 105 S.Ct. at 2817-18)).

In *Mitchell*, the court held that a district court's order denying a defendant's motion for summary judgment was an immediately appealable collateral order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), where (1) the defendant was a public official asserting a defense of immunity, and (2) the issue appealed concerned whether or not certain given facts showed a violation of clearly established law. *Mitchell*, 472 U.S. at 528, 105 S.Ct. at 2816-17.

[7]*Johnson v. Jones* __ U.S. __, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

[8]*Id*, at __, 115 S.Ct. at 2156 (holding that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order *insofar as* that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial,") (emphasis added).

determination about 'genuine' issues of fact for trial."[9] The Court then held that we have jurisdiction over the former, a purely-law-based denial of qualified immunity, but that we have no jurisdiction over the latter, a genuine-issue-of-fact-based denial of qualified immunity.[10] It follows that when we determine that a district court's order denying qualified immunity turns on "purely legal" grounds, we have jurisdiction to review it; but, when the district court's denial turns on the existence of a factual dispute, we have no jurisdiction and must dismiss the appeal.[11]

B. WHEN § 1983 AND TITLE VII MEET

Asserting a "purely legal" error, the Defendants contend that allegations of discriminatory treatment in connection with public employment that form the basis of a Title VII claim cannot form the basis of a second, separate claim under § 1983 as well. We agree. In *Irby v. Smith*,[12] we held that a violation of Title VII cannot also support a

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[9]*Id* at __, 115 S.Ct. at 2158.

[10]*Id* at __, 115 S.Ct. at 2159.

[11]*Tamez*, 62 F.3d at 125 ("The Court in *Johnson* held that a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact for trial.") (quotations and citations omitted); *Buonocore v. Harris*, 65 F.3d 347, 360 (4th Cir. 1995)("The *Jones* court made it clear that appellate jurisdiction over [purely legal issues] should not be regarded as a basis for exercising pendant jurisdiction over fact-related qualified immunity questions."); *Babb v. Lake City Community College*, 66 F.3d 270 (11th Cir. 1995) ("A district court's order on qualified immunity which determines only a question of 'evidence sufficiency' regarding plaintiff's claim is not appealable.").

[12]737 F.2d 1418 (5th Cir. 1984).

§ 1983 suit.[13] Section 1983 does not create any substantive rights; it creates only a remedy for the violation of a substantive federal right.[14] Thus, § 1983 is not available when "the governing statute provides an exclusive remedy for violations of its terms."[15]

The governing statute, Title VII in this case, provides Jackson's exclusive remedy.[16] Congress intended for Title VII—with its own substantive requirements, procedural rules, and remedies—to be the exclusive means by which an employee may pursue a discrimination claim. Allowing a plaintiff to state a discrimination claim under § 1983 as well would enable him to sidestep the detailed and specific provisions of Title VII.[17] In denying Defendants' motion to dismiss Jackson's Title VII claims under Rule 12(b)(6),

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[13]*Id.* at 1429; *see also Grady v. El Paso Community College*, 979 F.2d 1111, 1113 (5th Cir. 1992) ("[A] violation of Title VII cannot support a § 1983 suit.").

In *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019, 110 S.Ct. 718, 107 L.Ed.2d 738 (1990), we qualified our position in *Irby* by holding that a plaintiff could pursue a remedy under § 1983 as well as under Title VII when the employer's conduct violates both Title VII and a *separate constitutional or statutory right*. As Jackson alleges racial discrimination as the sole basis for his § 1983 claim, he has not identified a separate constitutional or statutory right and thus *Johnston* is inapplicable.

[14]*Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28, 101 S.Ct. 1531, 1545-46, 67 L.Ed.2d 694 (1981).

[15]*Id.* (citations omitted).

[16]*Irby*, 737 F.2d at 1429.

[17]*See Irby*, 737 F.2d at 1429. For example, § 1983 authorizes compensatory and punitive damages, which in many cases are not available in a title VII case. *Id.*

the district court necessarily determined that Jackson's allegations of racial discrimination are sufficient to establish a clear violation of Title VII and thus a clear deprivation of a federal right. Consequently, § 1983 is not available to Jackson for either alternative or additional relief. As Jackson thus has no access to a remedy under § 1983, it follows that he may not assert such a claim. Thus, Jackson's putative § 1983 claims, arising as they do from precisely the same allegedly discriminatory acts as do his Title VII claims, should have been dismissed. Accordingly, we remand Jackson's § 1983 claims against the Defendants to the district court with the instruction to dismiss them.

C. Other Alleged Errors

The Defendants urge an additional error which has now been rendered moot by our holding in the preceding paragraph. We refer to the Defendants' insistence that, in addition to qualified immunity, they are entitled to absolute legislative immunity. It is well established that immunity, be it absolute or qualified, is an affirmative defense available to public officials and under sued under § 1983.[18] As we remand Jackson's § 1983 claims with instructions for their dismissal, the Defendants no longer need the shelter of absolute immunity. Accordingly, we dismiss as moot all appellate issues arising from the defendants' assertion of the affirmative defense of absolute immunity.

III

CONCLUSION

For the forgoing reasons, the Defendants' interlocutory appeal of the district court's refusal to dismiss Jackson's Title VII claims are DISMISSED for want of jurisdiction. The same fate is appropriate for Defendants'

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[18] *See e.g., Barker v. Norman*, 651 F.2d 1107, 1120 (5th Cir. Unit A 1981).

defense of absolute immunity, albeit on grounds of mootness. the district court's order denying Defendants' motion to dismiss Jackson's § 1983 claims, however, is REVERSED and REMANDED with instructions to dismiss such claims against the Defendants.

DISMISSED in part; REVERSED and REMANDED in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

WINFRED WAYLON JACKSON,	§	
	§	
Plaintiff,	§	
	§	
v.	§	2:93cv214
	§	
CITY OF ATLANTA, TEXAS,	§	
JIM LONG,	§	
PEYTON CHILDS,	§	
CHARLES RILEY,	§	
JOHN PIERCE ELLIS, and	§	
RANDALL LEE, Each in his	§	
Individual and Official	§	
Capacity,	§	
	§	
Defendants.	§	

ORDER

On this day come to be considered Defendant Atlanta's Motion to Strike Dr. Rafael Otero (docket number 33-1), Defendant Atlanta's Motion to Compel Disclosure (docket number 33-2), Defendant Atlanta's Motion to Extend Time (docket number 33-3), Defendant Atlanta's Motion to Dismiss or for Summary Judgment (docket numbers 43-1 and 43-2), Plaintiff's Motion to Extend Time (docket number 39); and All Defendants' Motion to Dismiss or for Summary Judgment (docket number 42-1 and 42-2). After careful consideration, the Court is of the opinion that the following order should issue.

The Court dismisses the plaintiff's claims against all defendants for defamation pursuant to the Texas Tort Claims Act. *See* Tex. Civ. Prac. & Rem. Code Ann. § 101.157(2) (West 1986); *Gillum v. City of Kerrville*, 3 F.3d

117, 122 (5th Cir. 1993); *City of Dallas v. Moreau*, 718 S.W.2d 776, 779-80 (Tex. App. -- Corpus Christi 1986, writ ref'd n.r.e.). The Court also dismisses the plaintiff's claim for intentional infliction of emotional distress against the City of Atlanta. Tex. Civ. Prac. & Rem. Code Ann. § 101.157(2); *Gillum*, 3 F.3d at 122-23.

The Court denies the City's motions to dismiss or for summary judgment with respect to all other claims. There are genuine issues of material fact with regard to these issues. The Court denies the officials' motion to dismiss on the basis of qualified immunity. The Court finds that the plaintiff has met his summary judgment burden and the defendants have not overcome it with sufficient justification.

The Court denies the City's motion to strike Dr. Otero. The Court, however, will not permit testimony of an expert who has not timely provided a comprehensive report under the Plan. It is, therefore,

ORDERED that Defendant Atlanta's Motion to Strike Dr. Rafael Otero (docket number 3301) is DENIED. It is further

ORDERED that Defendant Atlanta's Motion to Compel Disclosure (docket number 33-2) is DENIED. It is further

ORDERED that Defendant Atlanta's Motion to Extend Time (docket number 33-3) is DENIED AS MOOT. It is further

ORDERED that Defendant Atlanta's Motion to Dismiss (docket number 34-1) is GRANTED IN PART AND DENIED IN PART, as discussed above. It is further

ORDERED that Defendant Atlanta's Motion for Summary Judgment (docket number 34-2) is DENIED. It is further

ORDERED that Plaintiff's Motion to Extend Time

(docket number 39) is DENIED AS MOOT. It is further

ORDERED that All Defendants' Motion to Dismiss or for Summary Judgment (docket number 42-1 and 42-2) is DENIED.

Signed this 3rd day of February, 1995.

s/s
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE FIFTH CIRCUIT

No. 95-40266

WINFRED WAYLON JACKSON,

Plaintiff-Appellee,

v.

ATLANTA, TEXAS, CITY OF

Defendant,

and

JIM LONG, Individually and His Capacity as City Manager; PEYTON CHILDS, Individually and in His Capacity as Mayor of the City of Atlanta, Texas; CHARLES RILEY, Individually and In His Capacity as City Councilman for the City of Atlanta, Texas; JOHN PIERCE ELLIS, Individually and In His capacity as City Councilman for the City of Atlanta, Texas; RANDALL LEE, Individually and In His capacity as City Councilman of the City of Atlanta, Texas,

Defendants-Appellants.

Appeal from the United States District court for the Eastern District of Texas, Marshall

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ON PETITION FOR REHEARING

(March 6, 1966)

Before WEINER, PARKER and DENNIS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

s/s
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
JUL 3 1996
CLERK

No. 95-1958

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

WINFRED WAYLON JACKSON,
Petitioner,

v.

CITY OF ATLANTA, TEXAS, ET AL.,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 5, 1996

20 pp

QUESTION PRESENTED

Whether Title VII is the exclusive remedy for claims of racial employment discrimination for state or local government employees, so that such employees may not bring an action under 42 U.S.C. § 1983 when the only alleged basis for the § 1983 claim is a violation of the rights secured by Title VII?

LIST OF PARTIES

1. Winfred Waylon Jackson, Petitioner
2. Jim Long, Respondent
3. Peyton Childs, Respondent
4. Charles Riley, Respondent
5. John Pierce Ellis, Respondent
6. Randall Lee, Respondent

Other parties to the district court decision who were not parties to the appeal to the Fifth Circuit and thus are not parties in this Court:

1. City of Atlanta, Texas [1]

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[1]To the extent the City of Atlanta is required to enter an appearance before this Court, the undersigned counsel of record for the city officials hereby appears on behalf of the City for purposes of proceedings before this Court only.

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STATEMENT OF THE CASE

Respondents concur generally with Petitioner's statement of the case as set forth in his Petition, but add the following.

In his district court live pleading, Petitioner attempted to assert causes of action for violations of (1) Title VII, (2) 42 U.S.C. § 1983, and (3) 42 U.S.C. § 1981. Petitioner did not allege any constitutional violations. Petitioner supported each claim with the same nucleus of operative facts, which he summarizes on page 6 of the Petition. He acknowledges that Respondent Long informed him he was discharged for legitimate reasons, yet Petitioner claims he was terminated from his position as Fire Chief of the City of Atlanta, Texas, because of his race.

The United States District Court for the Eastern District of Texas, the Honorable William M. Steger, denied both the city's and the city official's motions to dismiss or for summary judgment on the above claims. The city officials, Respondents, appealed the interlocutory order to the United States Court of Appeals for the Fifth Circuit, as the grounds for their motion included qualified immunity. *Johnson v. Jones*, ___ U.S. ___, 115 S. Ct. 2151, 2158 (1995). The City of Atlanta did not appeal.

In a per curiam opinion, without hearing oral argument, the Fifth Circuit first concluded that the denial of Respondents' motion to dismiss or for summary judgment as to the Title VII claim was a non-final pretrial order and not appealable under 28 U.S.C. § 1291. Lacking jurisdiction, the Fifth Circuit dismissed that portion of the appeal. Respondents filed a Petition for Panel Rehearing on this point, which was denied. As to the § 1983 claim, the court of appeals followed its precedent, *Irby v. Sullivan*, 737 F.2d 1418, 1429 (5th Cir. 1984), which held that a violation of Title VII cannot also support a § 1983 suit. However, most

important for the purposes of the Petition to this Court is the Fifth Circuit's qualification of the *Irby* rule. In *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990), the court held that a plaintiff could pursue a remedy under § 1983 concurrently with Title VII when the employer's conduct violates both Title VII and a "*separate constitutional or statutory right*." Petitioner's App. 6a n.13. Finding that Petitioner did not identify a *separate* constitutional or statutory violation to support his § 1983 claim, the court concluded that Title VII was Petitioner's exclusive remedy for his allegations of racial discrimination.

SUMMARY OF ARGUMENT

This case creates no conflict with other circuit decisions. The Fifth Circuit has merely reaffirmed the principle that an employment discrimination plaintiff cannot base a § 1983 action on violations of rights created by Title VII, where no separate and independent alleged violations exist to support the § 1983 claim. The holding in this case is identical with the result in *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984), cited by Petitioner. It is also consistent with the collective reasoning of each circuit opinion upon which Petitioner relies. As no conflict exists among the circuits, Rule 10 jurisdiction is not invoked. Therefore, this Court should deny the writ.

ARGUMENT

REASONS FOR DENYING THE WRIT

PETITIONER DOES NOT INVOKE RULE 10 CERTIORARI JURISDICTION BECAUSE AN EXAMINATION OF THE AUTHORITY CITED BY PETITIONER REVEALS THAT NO REAL OR INTOLERABLE CONFLICT EXISTS AMONG THE CIRCUITS.

A. This case presents nothing more than an opportunity merely to reaffirm settled law.

The authority Petitioner cites is subject to only one reasonable interpretation. If a civil rights plaintiff alleges a violation of rights created by Title VII, then Title VII is that plaintiff's exclusive remedy. On the other hand, if a civil rights plaintiff alleges a violation of (1) rights created by Title VII, along with (2) constitutional or statutory rights separate from Title VII, then that plaintiff may bring a Title VII claim together with a § 1983 claim. In such a scenario, the § 1983 claim is based on rights independent of the Title VII claim. Section 1983 does not create substantive rights but only affords a remedy for existing federal rights created elsewhere. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981). In the instant case, Petitioner did not identify a separate infringement apart from the "racial discrimination" allegation which supports his Title VII action. Thus, the Fifth Circuit correctly held Title VII to be Petitioner's exclusive remedy, based on his alleged facts. The decision creates no conflict with other circuits, or this Court, but only reaffirms settled law; therefore this Court should deny the writ. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting).

Although Petitioner cites 28 U.S.C. § 1254(1) as a jurisdictional basis for review, his challenge underscores the reasons for Supreme Court Rule 10, this Court's procedural rule which identifies the character of reasons considered in the grant or denial of a petition for certiorari. The rule [10].1. states:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . .
>
> (c) . . . or has decided a federal question in a way that conflicts with applicable decisions of this Court.

SUP. CT. R. 10.

Neither criteria is met in this case.

B. The Fifth Circuit's decision is in harmony with other circuits and is consistent with a true reading of relevant legislative history.

1. *The circuits are in agreement.*

Petitioner argues the Fifth Circuit's decision is in conflict with: *Annis v. County of Westchester*, 36 F.3d 251 (2d Cir. 1994); *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989); *Roberts v. College of the Desert*, 870 F.2d 1411 (9th Cir. 1988); *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987); *Trigg v. Fort Wayne Community Sch.*, 766 F.2d 299 (7th Cir. 1985); and *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984). Petitioner relies upon those decisions, collectively, as "holding that Title VII is not the exclusive remedy for discrimination claims against state or municipal employers, where those claims derive from *violations of Constitutional rights*." Petition, p. 9 (emphasis added). Respondents do not dispute this proposition. Yet, Petitioner does not advise this Court that he has not alleged a violation of any constitutional right.

A careful analysis of the circuit decisions at issue demonstrates that Title VII has not "repealed by implication" § 1983's remedial provisions, as Petitioner contends. In *Annis v. County of Westchester*, 36 F.3d 251 (2d Cir. 1994), the plaintiff brought a sex discrimination lawsuit against her county employer alleging infringement of § 1983, § 1985, and her Fourteenth Amendment right to due process and equal protection. She did not plead a Title VII claim. The district court dismissed her lawsuit concluding that she must concurrently bring a Title VII action and follow that statute's procedures. *Id.* at 253.

Reversing, the Second Circuit held that an employment discrimination plaintiff alleging the violation of a constitutional right may bring suit under § 1983 alone, and is not required to plead concurrently a violation of Title VII.

Id. at 255. Moreover, *Annis* emphasized that its ruling was consistent with every other circuit that has considered the issue. In support, *Annis* cited all of the cases upon which Petitioner currently relies before this Court, as well as, notably, the Fifth Circuit's opinion in *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019 (1990). *Annis*, 36 F.3d at 254 (". . .every circuit that has considered this issue has held that Title VII is not the exclusive remedy for discrimination claims against state or municipal employers, where those claims derive from violations of Constitutional rights").

The Sixth Circuit reached a similar conclusion in *Day v. Wayne County Bd. of Auditors*, 749 F.2d 1199 (6th Cir. 1984). *Day* is not in conflict with the instant case. In fact, the results reached in *Day*, and the results reached here, are identical. James Day, a white male, sued his county employer charging that he had been the victim of discrimination in violation of Title VII, § 1983, and § 1981. As here, Day did not assert constitutional violations. The court in *Day* began with the premise that where a statute provides a particular procedure and an exclusive remedy for violations, § 1983 is not available to obtain additional relief. *Id.* at 1202 (citing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)). Guided by this Court's analysis of Title VII in *Great Am. Fed. Sav. & Loan Ass'n v. Novotny*, 442 U.S. 366 (1979),[2] the court stated that Title VII provides the

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[2]*Novotny* involved the availability of § 1985(3) in conjunction with Title VII where a discharged private employee claimed he was terminated in retaliation for supporting female coworkers who complained of disparate treatment. This Court reviewed the scope of Title VII and reasoned:

> If a violation of Title VII could be asserted through § 1985(3), a complainant could avoid most if not all of these detailed and

exclusive remedy when the § 1983 cause of action is based only on a violation of Title VII. *Day*, 749 F.2d at 1204.

Day's clear holding applies with equal force here and demonstrates that certiorari must be denied. Where a state or local employee establishes conduct infringing on both Title VII and rights derived from another source which existed at the time of Title VII's enactment, the claim based on the other source is independent of the Title VII claim and § 1983 relief is available. *Day*, 749 F.2d at 1205. The court continued: "[h]ere the district court found that the defendants did not discriminate against the plaintiff. The only wrongful act was their retaliation for the plaintiff's actions, a violation of Title VII. We conclude that Congress did not intend this violation to be the basis of a § 1983 claim." *Id.*[3] *Day*'s result is on square footing with the Fifth circuit's decision at issue. "As Jackson alleges racial discrimination as the sole basis for his § 1983 claim, he has not identified a separate

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> specific provisions of the law. Section 1985(3) expressly authorized compensatory damages; punitive damages might well follow. The plaintiff or defendant might demand a jury trial. The short and precise time limitations of Title VII would be grossly altered. Perhaps most importantly, the complainant could completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress in Title VII.
>
> *Novotny*, 442 U.S. at 375-76.

[3]The Sixth Circuit has recently held, again, that an employment discrimination plaintiff who does not allege violations of separate constitutional or statutory rights is restricted to Title VII for relief. The court apparently thought the proposition so unremarkable as to order the decision not published. *Willis v. Morris*, No. 95-5107, 1995 WL 613642 (6th Cir. Oct. 18, 1995).

constitutional or statutory right and thus [is limited to Title VII]. Petitioner's App. 6a n.13.

Other cases decided since *Day*, and cited by Petitioner, have reached results consistent with the Fifth Circuit's holding in the instant case. For example, in *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064 (3d Cir. 1990), the Third Circuit concluded that a plaintiff who alleged violations of Title VII, § 1983, and the First and Fourteenth Amendments was entitled to bring Title VII and § 1983 claims together. *Id.* at 1079. Likewise, *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), acknowledged that "a right created solely under Title VII cannot serve as the basis for an independent remedy under Section 1983, lest Congress' prescribed remedies under Title VII be undermined." *Id.* at 813. *Starrett* ultimately held, however, that the sex discrimination plaintiff in that case could bring a § 1983 claim concurrently with Title VII because her § 1983 claims were predicated on the First and Fourteenth Amendments. *Id.*

The Ninth and Fourth Circuit decisions in *Roberts v. College of the Desert*, 870 F.2d 1411 (9th Cir. 1988), and *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987), are not to the contrary as both of those cases involved alleged constitutional violations joined with an employment discrimination claim. This proposition is also echoed in *Trigg v. Fort Wayne Community Sch.*, 766 F.2d 299 (7th Cir. 1985). The *Trigg* plaintiff brought a racial discrimination case against her state employer based only upon § 1983 and the Fourteenth Amendment. The employer took the position that Trigg's Fourteenth Amendment rights were not independent of her Title VII rights and that Title VII preempted her claims. *Id.* at 300. The Seventh Circuit rejected this argument noting that a discharged state employee's right to sue under § 1983 for equal protection

violations was well established before passage of Title VII. *Id.* at 302. Respondents do not dispute *Trigg*'s holding.

2. *Legislative history shows that Title VII is the exclusive remedy for violations of its terms.*

Petitioner also cites Title VII's legislative history as making clear "that it was Congress' intent to leave section 1983 intact and available for the redress of illegal employment discrimination." Petition, p. 11. Petitioner accurately quotes, but misinterprets, H.R. No. 92-238. The Sixth Circuit explained the distinction in *Day*:

> We believed [*sic*] the committee referred to the right to sue under § 1983 for constitutional violations or for violation of statutes which protected such employees before the enactment of the 1972 amendments. Claims under these existing laws were not affected; they could be pursued along with claims under Title VII for the purpose of obtaining additional remedies. *However, we do not read this language as expressing an intent that where employer conduct violates only Title VII, which created new rights and remedies for public employees, an aggrieved employee may sue under both Title VII and § 1983.*

Day, 749 F.2d at 1204-05 (emphasis added). The legislative history shows only that Congress resolved not to make Title VII the sole statutory remedy for employment discrimination by municipal employers when the conduct is alleged to have violated the Constitution. *See Annis*, 36 F.3d at 255 (citing *Keller*, 827 F.2d at 958-62, 965-66, which the court noted "reviewed the legislative history of Title VII in as much detail as anyone would wish").

Notably, no case cited by Petitioner discussed or perceived any circuit conflict on this issue. Indeed, they generally note their respective decisions to be consistent with other circuits. *See, e.g., Annis*, 36 F.3d at 264; *Keller*, 827 F.2d at 962; *Trigg*, 766 F.2d at 302.

C. The Fifth Circuit's decision does not conflict with this Court's rulings in *Jett* and *Johnson*.

Petitioner's contention that the Fifth Circuit's decision conflicts with this Court's decisions in *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989), and *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1974), similarly lacks merit as those cases are not on point or are distinguishable.

The thrust of *Jett* involved the right to recover against municipalities for the conduct of individual employees. Although *Jett* held that § 1983 "provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor," the continued vitality of this ruling is called into question after the Civil Rights Act of 1991 which added § 1981(c). Section 1981 (c) provides: "the rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of state law."

In any event, Petitioner's assertion of a § 1981 claim does not prevent dismissal of his § 1983 claim in this context for a variety of reasons. The Fifth Circuit has held that § 1981 does not apply in the discriminatory discharge context when such a claim is covered by Title VII. *Carter v. South Cent. Bell*, 912 F.2d 832, 839 (5th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). One reason for this conclusion is that if conduct is covered by both § 1981 and Title VII, the procedures of Title VII are "rendered a dead letter." *Id.*

(citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 181-82 (1989)). *Carter* refused to stretch the protections of § 1981 to conduct that Title VII already proscribes. *Carter*, 912 F.2d at 839. To construe the cases as Petitioner urges serves only to effect an "end run" around the requirements of Title VII. Petitioner's causes of action under Title VII, § 1983, and § 1981, are all based on the same operative facts, which he has not contended invoke constitutional rights. His only ground for a § 1983 claim is alleged racial discrimination.

Moreover, to the extent such claims are not duplicative, the elements of an employment discrimination claim under § 1981 and Title VII are identical. *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1284 n.7 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1099 (1995). Further, Petitioner has not pleaded facts sufficient to support a § 1981 claim. For these reasons, the Fifth Circuit's decision is not at odds with *Jett* or *Johnson*.

CONCLUSION

Petitioner's reading of the Fifth Circuit's decision is simply too broad. The court of appeals did not hold that Title VII preempts § 1983 in all circumstances, which appears to be the thrust of Petitioner's argument to this Court. Upon close examination, this case does not conflict with the decisions of other circuits, or decisions of this Court.

For all these reasons, this Honorable Court should deny the petition for writ of certiorari.

Respectfully submitted,

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PETITIONER' S REPLY TO RESPONDENT' S BRIEF IN OPPOSITION TO CERTIORARI

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

I.

In their brief in opposition to the petition for a writ of certiorari, respondents argue that there is no conflict between the circuits, relying on erroneous readings of both the decision below and the contrary decisions of other circuits.

The specific issue presented by the petition herein is whether Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, is the exclusive remedy for claims of employment discrimination brought by state and local government employees, to the exclusion of 42 U.S.C. § 1983 or, indeed, 42 U.S.C. § 1981. The Fifth Circuit unequivocally held that it was:

> The governing statute, Title VII in this case,

> provides Jackson's exclusive remedy. Congress intended for Title VII—with its own substantive requirements, procedural rules, and remedies—to be the exclusive means by which an employee may pursue a discrimination claim.

73 F.3d 60, 63 (5th Cir. 1996), App. p. 6a (footnote omitted).

Just as unequivocally, the Second Circuit in *Annis v. County of Westchester*, 36 F.2d 251 (2nd Cir. 1994), held that Title VII was *not* the exclusive remedy for such claims, but that a public employee can bring an action for discrimination under § 1983:

> Congress undoubtedly and repeatedly considered the exclusivity question and, in the end, resolved not to make Title VII the sole statutory remedy for employment discrimination by state and municipal employers that amounts to a constitutional tort.

36 F.2d at 255 (footnote omitted). See also, *Keller v. Prince George's County*, 827 F.2d 952 (4th Cir. 1987), cited by *Annis*.

Moreover, the circuits are in direct conflict with regard to the rationale advanced for the Fifth Circuit's holding that Title VII was the exclusive remedy. Thus, the Fifth Circuit held that:

> Allowing a plaintiff to state a discrimination claim under § 1983 as well would enable him to sidestep the detailed and specific provisions of Title VII.

73 F.2d at 63, App. at 6a (footnote omitted). The Second Circuit, on the other hand, rejected the lower court's holding that a plaintiff must satisfy the procedural requirements of Title VII. 36 F.3d at 254, 255.

The respondents' argument that there is no conflict is based on language in *Annis* to the effect that Title VII is not the exclusive remedy for employment discrimination claims that are "cognizable under the Constitution." 36 F.3d at 254. Opposition to Petition for Writ of Certiorari, 5, 6-7. However, the import of this language is only that § 1983 can not be used to challenge alleged employment discrimination that would not violate the Constitution, *i.e.*, discrimination that violated equal protection or due process. To the extent that other types of discrimination were not also constitutional torts, section 1983 could not be used.

In the present case, of course, the facts alleged clearly establish a violation of the fourteenth amendment, in that they allege discrimination based on petitioner's race. Thus, the decision below cannot simply be read as holding that the complaint in the case was irremediably deficient in that it did not mention the Constitution; such a holding would violate the basic principle of federal procedure that a complaint will not be dismissed if the facts alleged set out a cause of action cognizable under federal law. If the only point of the Fifth Circuit's decision was that there was a defective allegation of jurisdiction under Rule 8(a), F.R.Civ. Proc., the cure would be a remand to permit petitioner to amend the complaint under 28 U.S.C. § 1653, not dismissal.

II.

Moreover, as pointed out in the petition for a writ of certiorari, the complaint did in fact plead section 1983 as the basis for a claim under 42 U.S.C. § 1981. The Fifth Circuit's decision is, therefore, only comprehensible as a reiteration and expansion of its earlier holding, cited by respondents, that Title VII is the exclusive remedy over a claim previously cognizable under section 1981. *Carter v. South Cent. Bell*, 912 F.2d 832 (5th Cir. 1990), *cert. denied*, 501 U.S. 1260 (1991). Once again, the rationale for the holding in *Carter* is that a plaintiff should not be able to bring an action under section 1981 because that would permit the evasion of the procedural requirements of Title VII. 912 F.2d at 839.

While petitioner agrees with respondent that the continued vitality of *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989) may be questionable because of the addition of subsection (c) to section 1981 by the Civil Rights Act of 1991, this only highlights the importance of the issue presented by the petition in this case. Certainly, the lower federal courts need guidance as to whether other statutory remedies are still available to victims of discrimination in employment that is covered by Title VII.

III.

The need for review and guidance by this Court is highlighted by respondent's discussion of the decisions of the various circuits cited in *Annis*. It is clear that the Second and Fifth Circuits are in direct conflict. It is also evident that the other circuits are in substantial disarray, with holdings that, in general Title VII is not the exclusive remedy, but with qualifications of that general rule in other decisions.

Thus, as noted in the petition at pp. 8-9, nn. 4, 7, both the Sixth and Tenth Circuits have handed down decisions that are equivocal on the issue. In *Day v. Wayne County Board of Auditors*, 749 F.2d 1199 (6th Cir. 1984), the court's *holding* was that since the only illegal act that was proven was a violation of Title VII's prohibition against retaliation for filing a charge with the Equal Employment Opportunity Commission, Title VII was the exclusive remedy and 42 U.S.C. § 1983 could not be used. In its more recent unpublished decision in *Willis v. Morris*, 70 F.3d 116, 1995 WL 613642 (6th Cir. No. 95-5107, Oct. 18, 1995) *cert. denied*, 64 U.S.L. W. 3639 (March 25, 1996), however, the Sixth Circuit held more broadly that a claim of sex discrimination could not be brought under section 1983 since Title VII provided the exclusive remedy, citing the Tenth Circuit's decision in *Allen v. Denver Public School Bd.*, 928 F.2d 978, 982 (10th Cir. 1991). However, *Allen* itself appears inconsistent with the Tenth Circuit's earlier decision in *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989), which held that employment discrimination claims can be brought under

both section 1983 and Title VII.

In sum, there is both disagreement and confusion among the courts of appeals as to whether Title VII is the exclusive remedy for all claims of discrimination by state and local government employees, or whether some or all of such claims can also be brought pursuant to 42 U.S.C. § 1983 and/or § 1981. The present case thus raises important questions as to whether *Johnson v. Railway Express Agency*, 421 U.S. 454 (1974) has been *sub silentio* overruled, and as to the continuing vitality of *Jett v. Dallas Independent School Dist.*, 491 U.S. 701 (1989). This Court should grant certiorari to resolve these questions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Since the filing of Petitioner's Reply to Respondents' Brief in Opposition to Certiorari, there has been an intervening event that is relevant to the Court's consideration of the petition herein. On September 24, 1996, the United States, at the Court's invitation for its views, filed a brief suggesting that the Court grant the Petition for a Writ of Certiorari in No. 95-1439, *Lakoski v. University of Texas Medical Branch*. *Lakoski* raises an issue closely related to the issue presented here, viz., whether Title VII is the exclusive remedy for claims of employment discrimination based on gender for employees of federally funded state institutions, to the exclusion of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

The present case raises the question of whether Title VII is the exclusive remedy for claims of employment discrimination based on race for employees of state or local

governments, to the exclusion of 42 U.S.C. §§ 1981 and 1983. The two cases together provide the opportunity to decide different aspects of the issue of whether Title VII is the exclusive remedy for employment discrimination, a question concerning which the lower courts require guidance.

Petitioner, therefore, respectfully suggests that it would be appropriate for the Court to grant certiorari in both *Lakoski* and the present case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the court below reversed.

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